

FEDERAL MAGISTRATES COURT OF AUSTRALIA

ALLY v MINISTER FOR IMMIGRATION & ANOR

[2007] FMCA 430

MIGRATION – MRT decision – spouse visa – refused for absence of genuine and continuing relationship and mutual commitment at time of visa application – husband withheld knowledge that HIV positive – equivocal evidence of cohabitation – long periods of separation – relevance of consideration of events subsequent to application – no jurisdictional error found.

Acts Interpretation Act 1901 (Cth), s.8

Judiciary Act 1903 (Cth), s.39B

Migration Act 1958 (Cth), ss.359A, 483A, Pt.8

Migration Litigation Reform Act 2005 (Cth), Sch.1 cl.41

Migration Regulations 1994 (Cth), reg.1.15A, 1.15A(1A), 1.15A(1A)(b), 1.15A(3), 1.15A(3)(a), 1.15A(3)(b), 1.15A(3)(c), 1.15A(3)(d), Sch.2 item 820.211(2)(a)

Comptroller-General of Customs v ACI Pet Operations Pty Ltd (1994) 49 FCR 56

Comptroller-General of Customs v Akai Pty Ltd (1994) 50 FCR 511

Craig v South Australia (1995) 184 CLR 163

Minister for Immigration & Multicultural Affairs v Asif (2000) 60 ALD 145

Minister for Immigration & Multicultural Affairs v Eschetu (1999) 197 CLR 611

Minister of State for Immigration, Local Government and Ethnic Affairs v Dhillon (Federal Court of Australia, Full Court, unreported 8 May 1990)

Plaintiff S157/2002 v Commonwealth of Australia (2003) 211 CLR 476

Puhlhofer v Hillingdon London Borough Council [1986] AC 484

Re Minister for Immigration & Multicultural & Indigenous Affairs; Ex parte Applicants S134/2002 (2003) 211 CLR 441

Secretary, Department of Family and Community Services v Verney (2000) 60 ALD 737

The Hospital Benefit Fund of Western Australia Inc v Minister for Health, Housing & Community Services (1992) 39 FCR 225

Tolibao-Cortes v Minister for Immigration & Multicultural Affairs [2001] FCA 1183

Tracy v Repatriation Commission (2000) 101 FCR 149

Tran v Minister for Immigration & Multicultural & Indigenous Affairs (2003) 126 FCR 199

Applicant: SHUKURU ALLY

First Respondent: MINISTER FOR IMMIGRATION & CITIZENSHIP

Second Respondent: MIGRATION REVIEW TRIBUNAL

File Number: SYG3233 of 2005

Judgment of: Smith FM

Hearing date: 28 February 2007

Delivered at: Sydney

Delivered on: 20 April 2007

REPRESENTATION

Counsel for the Applicant: Mr I N Asuzu

Counsel for the First Respondent: Mr T Reilly

Solicitors for the Respondents: Australian Government Solicitor

ORDERS

(1) The application is dismissed.

**FEDERAL MAGISTRATES
COURT OF AUSTRALIA AT
SYDNEY**

SYG3233 of 2005

SHUKURU ALLY
Applicant

And

MINISTER FOR IMMIGRATION & CITIZENSHIP
First Respondent

MIGRATION REVIEW TRIBUNAL
Second Respondent

REASONS FOR JUDGMENT

1. This is an application filed on 4 November 2005 under s.483A of the *Migration Act 1958* (Cth) (“the Migration Act”) which seeks orders by way of judicial review of a decision of the Migration Review Tribunal (“the Tribunal”) dated 12 October 2005. The Tribunal affirmed a decision of a delegate made on 12 June 2003, which refused to grant a Partner (Temporary)(Class UK) visa and a Partner (Residence) (Class BS) visa to the applicant on spouse grounds.
2. The *Migration Litigation Reform Act 2005* (Cth) has repealed s.483A, but the repeal does not affect the present proceeding (see Sch.1 cl.41, and *Acts Interpretation Act 1901* (Cth), s.8).

3. Section 483A gives the Court the jurisdiction of the Federal Court under s.39B of the *Judiciary Act 1903* (Cth). This is subject to limitations under Part 8 of the Migration Act, which have the effect that that I cannot set aside the Tribunal decision and send the matter back unless I am satisfied that the decision was affected by jurisdictional error (see *Plaintiff S157/2002 v Commonwealth of Australia* (2003) 211 CLR 476 at [76], *Re Minister for Immigration & Multicultural & Indigenous Affairs; Ex parte Applicants S134/2002* (2003) 211 CLR 441 at [15] and [76]-[83] and subsequent cases). I do not have power myself to decide whether the applicant qualifies for the visas which she seeks.

The legislative background

4. The applicant entered Australia on 30 July 1999, to visit her sister. She then met Mr Musa Pene Okele, also known as Stanislas Kanengele-Yondjo (“the husband”), and married him on 16 July 2000. On 27 July 2000 she lodged her present application for temporary and permanent spouse visas. The relevant legislative scheme required the visa applicant to meet relationship criteria at the date of application. The applicant was also required to continue to meet those criteria at the date of decision, unless she established defined situations of relationship breakdown involving children or domestic violence. A permanent residence visa could only be obtained after the issue of the temporary visa, and after allowing a two year qualification period. It is unnecessary for me to identify the provisions of the Migration Regulations which had this effect.
5. In the present case, the applicant did not achieve the grant of even a temporary spouse visa. Decision-making on her visa application became protracted before the delegate, and then before the Tribunal, due to a perceived need to investigate the relationship which existed at the time of application and subsequently. As the history which I shall sketch below indicates, this task became complicated due to circumstances which developed over subsequent years and which continued to raise doubts about the relationship. Ultimately, the Tribunal, like the delegate, was unable to be satisfied as to the initial, time-of-application requirement under Sch.2 item 820.211(2)(a) of the *Migration Regulations 1994* (Cth) that “*the applicant is the spouse of a*

person who: (i) is an Australian citizen ...". Both decision-makers refused the visa application for that reason.

6. A decision whether the applicant was "the spouse" of her nominating husband as at 27 July 2000 was required to address issues going beyond the existence of a legal relationship of marriage, and to explore both its ostensible indications and also the subjective commitment of each spouse. This was the effect of reg.1.15A, which relevantly provided:

REG 1.15A Spouse

(1) For the purposes of these Regulations, a person is the spouse of another person if the 2 persons are:

- (a) in a married relationship, as described in subregulation (1A); or*
- (b) in a de facto relationship, as described in subregulation (2).*

(1A) Persons are in a married relationship if:

- (a) they are married to each other under a marriage that is recognised as valid for the purposes of the Act; and*
- (b) the Minister is satisfied that:*
 - (i) they have a mutual commitment to a shared life as husband and wife to the exclusion of all others; and*
 - (ii) the relationship between them is genuine and continuing; and*
 - (iii) they:*
 - (A) live together; or*
 - (B) do not live separately and apart on a permanent basis.*

(3) In forming an opinion whether 2 persons are in a married relationship, or a de facto relationship, in relation to an application for:

- (ab) a Special Eligibility (Residence) (Class AO) visa; or*

(ad) a Partner (Migrant) (Class BC) visa; or

(ae) a Partner (Provisional) (Class UF) visa; or

(af) a Partner (Residence) (Class BS) visa; or

(ag) a Partner (Temporary) (Class UK) visa;

the Minister must have regard to all of the circumstances of the relationship, including, in particular:

(a) the financial aspects of the relationship, including:

(i) any joint ownership of real estate or other major assets; and

(ii) any joint liabilities; and

(iii) the extent of any pooling of financial resources, especially in relation to major financial commitments; and

(iv) whether one party to the relationship owes any legal obligation in respect of the other; and

(v) the basis of any sharing of day-to-day household expenses;

(b) the nature of the household, including:

(i) any joint responsibility for care and support of children, if any; and

(ii) the parties' living arrangements; and

(iii) any sharing of responsibility for housework;

(c) the social aspects of the relationship, including:

(i) whether the persons represent themselves to other people as being married or in a de facto relationship with each other;

(ii) the opinion of the persons' friends and acquaintances about the nature of the relationship; and

(iii) any basis on which the persons plan and undertake joint social activities;

- (d) *the nature of the persons' commitment to each other, including:*
 - (i) *the duration of the relationship; and*
 - (ii) *the length of time during which the persons have lived together; and*
 - (iii) *the degree of companionship and emotional support that the persons draw from each other; and*
 - (iv) *whether the persons see the relationship as a long-term one.*
- (5) *If 2 persons have been living together at the same address for 6 months or longer, that fact is to be taken to be strong evidence that the relationship is genuine and continuing, but a relationship of shorter duration is not to be taken not to be genuine and continuing only for that reason.*

The history of the visa application

7. The circumstances in which the applicant met, married, and claimed to have lived with her husband during 2000 were described by her in the visa application:

I met Musa through my sister, who is long time friend of his. She asked him to pick me up from the airport the day I arrived in Australia (30.07.99), because she was admitted in Hospital. From that day we developed a friendship, he was a frequent visitor to a place I shared with my sister then ([address at Belmore]). We went out frequently, movies, dinner, parties, beach and dancing. During that time we fell in love. He then went to Africa for Holidays, he went to Tanzania as well and met my mum and my other relatives, he told them of his intentions to marry me. When he came back in January this year (2000) we continue seeing each other, at last we decided to make our relationship official by getting married.

Musa had been very supportive to me both financially and emotionally, the fact that I don't know many people here, places, and my limited ability to communicate in english, he has always been there for me and supported me financially whenever the need arises because I am not working.

We believe that our relationship is genuine and continuous one, because we have a common background (African). We speak the same local language and we share many customs and traditions which makes us comfortable in each others company, and most of all we love each other.

8. A statement signed by the husband on 26 July 2000, which was submitted with the visa application in response to a request for “*evidence that your relationship [with your partner] is genuine and continuing*”, said:

1. *Since Shukuru is on a visitor visa, the bank would not allow her to be on a joint account with me, because with her identity documents, she could not come up with 100 Pts require to open up an account. Provided that we are given time, we will make sure that this evidence is supplied at a later stage.*
2. *As for a joint lease, due to the fact that I am currently in an other joint lease with a friend, with whom I have been sharing for the past 10 months. Me and Shukuru spend time together at my place and have been doing that since last August. As soon as this lease runs out in September, we will be able to take up an apartment and be able to supply you with the evidence of a joint lease.*

9. In response to a request by the delegate, the applicant submitted some documents, including two statutory declarations by friends, a bank receipt showing a small balance in a joint account, and a registration certificate showing a car registered in joint names in September 2000. On 25 October 2000, the applicant informed the delegate that the husband “*will be leaving for overseas on 7th/10/2000. To attend some Family Matters. I am forced to remain here, since were not financially prepared for the trip which was not prior planned. I will be staying with my sister until he comes back*”.

10. The husband returned from Africa in April 2001, but on 8 May 2001 he told the delegate that he was still living at Woolloomooloo and “*not living with a/n. A/n lives with her sister. Why? She helps her sister and sister’s daughter*”. The delegate was told that they intended to move in together “*as soon as we can find something*”. The delegate gave them more time to provide “*further co-hab evidencing a genuine relationship*”.

11. The applicant in June 2001 forwarded a tenancy agreement for a 2 bedroom unit in Hurstville, in which the tenants were initially shown as the applicant's husband and a woman who was subsequently identified as his cousin. The applicant also presented a bank statement for a joint account with the applicant, and receipts for some furniture, clothing and jewellery. She subsequently claimed that she had lived at Hurstville with her husband for some months, before he again left for Africa in September 2001, and she returned to live with her sister at Blacktown. She told the delegate in December 2001: *"My husband and I we had plan to go to Zambia together because my husbands father died, at same time I got a job from the place I applied before and was told to start immediately. We discussed it with my husband and we decided that I take the job and he travel alone"*. The applicant was not able to indicate when she expected her husband to return, but she provided copies of some emails she had received from him.
12. The husband did not return to Australia until September 2002. He initially resided with his cousin at Ashfield. However, in October 2002 the applicant submitted some rental documents to corroborate her claim that he then lived with her in a two bedroom unit at Blacktown shared with her sister and niece.
13. In March 2003, the delegate sent a further letter requesting *"Evidence of co-habitation demonstrating that you are residing in a genuine and continuing relationship"*. In response, the applicant appointed a solicitor, who advised the delegate that the husband *"is currently in custody on alleged potential fraud charge in Perth. ... Mr Okele was visiting friends in Perth when he was taken into custody at the beginning of April, 2003"*. The husband was not released, but in July 2003 he was convicted for *"credit card fraud"* and sentenced to a term of imprisonment. He eventually served out this sentence in a NSW prison, and in May 2004 was due for release.
14. In June 2003, the applicant's solicitor presented to the delegate a substantial submission and supporting documents to show that the applicant and her husband satisfied the requirements of reg.1.15A. These included statutory declarations from the husband, the applicant, the applicant's sister, and some friends. They explained the long

periods of separation, and deposed to the couple being, and appearing to be, in a genuine and continuing marriage relationship.

15. The delegate finally made a decision on 12 June 2003, refusing visas on the ground that she was *“not satisfied that Ms Ally is residing in a genuine spouse relationship with her spouse Mr Pene Okele”*. The delegate concluded that *“the couple has never lived together. The nominator has spent large amounts of time overseas and the applicant appears to be residing permanently with her sister, Hadija Ally in Blacktown”*. She said: *“I am not satisfied that the couple have ever resided together as husband and wife. They have not presented any evidence, which demonstrates a shared life and a permanent commitment to each other”*.
16. The applicant’s appeal to the Tribunal was brought by her solicitor, and was supported with submissions and a statutory declaration from the husband’s cousin, explaining her presence as co-lessee on the 2001 Hurstville lease. Further material and submissions were presented in response to three invitations for further information and for comments on adverse information, and the applicant attended a hearing held by the Tribunal in November 2004. A transcript is not in evidence before me, and the Tribunal gives only a brief summary of her evidence.
17. Until May 2004, the applicant maintained that her marriage was intact, despite their separations. She said that she *“has taken with her all her husband’s property, including all his personal belongings, clothing etc. It is expected that once his term of custody has terminated he will return to the visa applicant”*.
18. However, in a letter dated 7 May 2004, the solicitor informed the Tribunal:

A most serious situation has now arisen which will most certainly affect the ongoing relationship between the visa applicant and her husband, namely the pending charges against the husband with two counts of knowingly infecting someone with HIV for which he was refused bail and for which he is due to appear in the Penrith Local Court on 7 May 2004.

Whilst the visa applicant learnt, during or about October 2003, that her husband was HIV positive and that they were investigating suspected charges of infecting third parties with the

disease, it was, however, only in April 2004 that the visa applicant learnt that her husband had formally been charged with two counts of maliciously causing two persons to contract a grievous bodily disease. It is under these circumstances that the visa applicant feels totally threatened and cannot continue a normal marriage relationship with her husband on his release from prison as [and] when that may be. In this regard we enclose herewith a statutory declaration of the visa applicant in support of her application.

In light of the present circumstances we are instructed to argue at the hearing of the review for a waiver of cohabitation on the grounds of 'domestic violence' under Regulation 1.20(3).

19. Among news reports forwarded by the applicant, was a report of a hearing in which the husband was refused bail. This said:

Police allege Kanengele-Yondjo, 40, was in relationships with the women last year, without saying he was HIV-positive. ... The unemployed man has been married to an Australian for four years but allegedly began a relationship with an Irish tourist in January 2003.

Police said Kanengele-Yondjo was diagnosed with HIV in 1999 but failed to tell his new partner, and on several occasions insisted on having unprotected sex. ... Kanengele-Yondjo became involved with his second alleged victim in March last year, while still having sex with the first woman.

20. The evidence before the Tribunal suggested that the husband was subsequently convicted and sentenced on these charges.
21. The applicant presented evidence that she had not been infected, but that “*having the knowledge that he is in fact HIV positive ... I can never resume cohabitation with my husband*”. In a submission dated 12 July 2004, which accompanied evidence directed at satisfying the “domestic violence” time-of-decision qualification, the applicant’s solicitor said:

The applicant’s claim derive from her marital relationship to her sponsor, who is currently serving a jail sentence for alleged infecting and/or having unprotected sex, when he is HIV positive. In any case, my client maintains that while they were married, they had always used condom, due to two reasons. First, as they failed to have HIV tests before marriage, it would be unsafe to

engage in such act unprotected. It has now become obvious why the husband was avoiding the test with his wife.

Secondly, since the couple had no means to start a family, there was no need to plan for such, at the time. It is then the case, that my client's refusal to have unprotected sex with her husband offended him. As a result, my client was verbally abused, hit across the face, pushed, assaulted and threatened with harm.

While my client was able to endure most of it, she assured the husband that she would go to the police, if ever she was raped or forced against her will to have unprotected sex. This threat worked, as the husband kept it on the low, to avoid involving the police. It must be born in mind that the husband did not disclose his positive HIV status to his wife, before or during their times together.

While in detention, the husband had requested his sister-in-law (applicant's sister) and his wife to sell his property and send the proceed to his family overseas. It appears that such proceed did not generate the expected amount, from a second hand sell. The husband therefore, threatened to harm them for cheating him out of the transaction. For this reason, the family do not feel safe, per release of the husband in future.

Knowing the propensity of the sponsor, they are sure that he does not make empty threats. It is for these reasons that I submit that the parties need to be kept apart, until a formal divorce proceedings are commenced, as soon as the statutory period is complete.

It is my submission therefore, that the life of my client is in danger of HIV infection. Secondly, my client's inability to fulfil her husband's, constant unrealistic financial demands, due to his dwindling opportunity to work, put her between a rock and a hard place. As a result she would be subjected to further verbal abuse and assault, if the applicant fails to come up with the demand.

In conclusion, my client is lucky to be alive, hence she could have been in a worse position, but for her stance. That in itself is a matter of surviving a domestic violence, a reunion is therefore dreaded. At least, upon her discovery of the husband's real attempt to have her infected with HIV AIDS virus, without her knowledge in the process.

22. The applicant sought to explain the significance of the husband's conduct in a statutory declaration sent to the Tribunal in August 2005. This included her statements:

3. *As I look at the whole situation now, I still do not understand the reason he kept secret such a sensitive issue albeit we have had tremendous discussions about different topics.*

...

7. *Although we discussed health issues among other issues, my husband did not express the willingness to undergo a HIV test. He would not respond to such request. On the contrary, he had persuaded me that nothing was wrong with him at all and that we could use condoms if I wanted to. We'd agree upon that until he would be frustrated after weeks of such use. That's when he would threaten me with violence, name-calling and intimidation.*

...

10. *My decision to marry Stan was for love. I loved him and apart from his reactions at times, I felt loved by him. At no point in time I could have suspected him of being such a devil in a sheep's skin.*

11. *I was not in a better position to know then, what I know now, in the sense that I cannot be expected to know what is hidden in the secret chambers of a man's heart. My sponsor husband has controlled that information and kept it so secretly and has guided it so close to his heart. This is because no one to my knowledge within the African community knew about his positive HIV result. More ever, it is obvious that the adage that the "wife is the last to know" rings true in this case.*

12. *I would never be able to comprehend what was actually in his mind as he kept secret on his health status and showed love and affection towards me, knowing that this was really a life threatening exposure. What is it that made him keep secret of his health? Was it shame? Was it love? (What kind of love), Was it recklessness? Or just mere cruelty? Honestly, I do not care as the result is the same whatever his reasons. He put my life in danger. As a result, he has abused me emotionally, physically, verbally ... His reckless behaviour is obviously a big threat of violence. We are*

facing here a potential criminal act since HIV destroys a person's life.

13. *Considering his insistence to have unprotected sex while he knew his HIV status and the consequences that would result from such deed shows me how devilish and cruel this man I married is.*
14. *Anybody that understands the impact of HIV on a person's life can understand how devastated I am, when I consider that the very person that I truly loved, and that for all this time I felt loved by, could expose me, without me knowing, to such danger. Just as a sheep is sent to be slaughtered. I feel so betrayed.*
15. *It is only by God's Grace that I am unscathed.*
16. *I believe that the fact of him hiding his HIV status, albeit it is a delicate issue, should not by itself be considered as a thermometer to what the level of commitment we had, as we had, as a couple, discussed so many other issues together. I can not be blamed when a spouse refused to reveal an issue that is supposed to be shared in a married relationship. I did not know and I had no means of knowing or finding out his medical condition, which was before my time with him.*

The Tribunal's reasons

23. In its statement of reasons, the Tribunal provided a short, but balanced, description of the history of the matter and the evidence presented to the Department and Tribunal. Under the heading "*Findings and Reasons*", it identified the relevant statutory provisions in a manner which, in my opinion, does not suggest any misconception as to their effect.
24. The Tribunal then made findings directed at the four matters required to be considered under reg.1.15A(3), before returning to the essential tests in reg.1.15A(1A). This was, in my opinion, a sensible approach to this regulation.
25. In relation to "*the financial aspects of the relationship*", the Tribunal considered the applicant's evidence of a joint bank account. It concluded that it was not satisfied "*that the evidence establishes that the 2 parties took any joint approach to managing their finances, or*

that they pooled their financial resources to any degree". No challenge is now made to that finding, which appears to cover the whole period of the claimed marital relationship.

26. The Tribunal also addressed the other pieces of evidence submitted in 2001 in relation to the couple's financial and property affairs, before reaching a general finding addressing reg.1.15A(3)(a):

34. *The review applicant told the Tribunal that the parties purchased a car a couple of months after their marriage, but she told the Tribunal that the nominator undertook all major purchases, and that she only received some money from him for basic expenses. The Tribunal accepts that the car is registered in joint names, but is not satisfied on the basis of the evidence that the parties were jointly involved in its purchase. The parties submitted joint receipts for the purchase of furniture, clothing and jewellery to the Department. The Tribunal finds that 3 receipts are dated after the parties' interview with the department on 21 August 2001, when, according to the delegate's notes, further information (including receipts) was promised. The Tribunal has given little weight to these receipts. The Tribunal has taken into account the evidence of a receipt of the purchase of a bed in late June 2001. The Tribunal is not satisfied, however, that the evidence establishes that at the time of application the parties were involved in joint purchases of major household items.*

35. *The Tribunal is not satisfied on balance that the evidence of the financial aspects of the relationship at the time of application is consistent with 2 persons in a genuine and continuing relationship.*

27. Turning to "*the nature of the household*", the Tribunal noted the statements made by the husband in the visa application and to the delegate, concerning their claimed Woolloomooloo residence at the time of visa application in 2000. It concluded: "*the Tribunal is not satisfied that the evidence establishes that the review applicant and the nominator established a household together at the Woolloomooloo address*". No challenge is made to this finding, and in my opinion it was open to the Tribunal on the evidence.

28. The Tribunal then considered the evidence as to their residence and claimed co-habitation in years after the visa application, before expressing a general finding addressing reg.1.15A(3)(b):

37. *The evidence regarding the parties' subsequent living arrangements is that the review applicant was in Africa from October 2000 until late April 2001, during which period the review applicant resided with her sister in Blacktown. After the nominator returned to Australia in April 2001 he stated that he resided in Woolloomooloo, whereas the review applicant continued to reside with her sister. Evidence has been submitted that the review applicant and the nominator then resided together in Hurstville from 19 May 2001 until November 2001. The Tribunal has considered the evidence that the lease was initially in the nominator's and Ms Bumbabu's name, and that the review applicant's name appears to have been added at a later stage. The Tribunal has considered the review applicant's comments at hearing that she did view the property with the nominator prior to renting it, but this evidence is not consistent with her subsequent statements that the nominator and Ms Bumbabu viewed the property and decided it should be rented. It is also not consistent with the evidence from the real estate agent that the nominator and Ms Bumbabu viewed the property. The Tribunal notes that when the Department contacted the review applicant and nominator at that address, the answering machine gave the names of the nominator and Ms Bumbabu only. The Tribunal has considered the review applicant's comments regarding this, but is not satisfied that they adequately explain the absence of any reference to the review applicant in the answering machine message.*

38. *The Tribunal has considered the other evidence regarding cohabitation at the Hurstville address, including documents showing the review applicant's name at the Hurstville address. The Tribunal accepts that the review applicant may have spent some time at the Hurstville address with the nominator. The Tribunal is not satisfied on balance however that the evidence establishes that the review applicant and the nominator established a household together at the address in Hurstville.*

39. *The Tribunal is not satisfied that the evidence of the nature of the household at the time of application is consistent with 2 persons in a genuine and continuing relationship.*

29. The Tribunal briefly examined the statutory declarations of friends and relatives of the applicant when considering “*the social aspects of the relationship*”. It stated a conclusion addressing reg.1.15A(3)(c), apparently covering the whole period of their claimed marital relationship:

43. *The Tribunal accepts that the parties undertook some social activities together. The Tribunal finds that there is limited social recognition by family and friends of the parties’ being in a married relationship.*

30. The Tribunal then addressed the considerations raised both under reg.1.15A(3)(d) and reg.1.15A(1A)(b) as to “*the nature of the persons’ commitment to each other*”. The latter provision required the Tribunal to be satisfied, as at the date of visa application, that “*they have a mutual commitment to a shared life as husband and wife to the exclusion of all others*” and “*the relationship between them is genuine and continuing*”. The Tribunal’s reasoning leading to adverse conclusions on both of these matters was:

44. *The review applicant gave evidence of the parties’ plans for the future, and some evidence was provided to the Department regarding plans for housing finance. The Tribunal accepts that they may have spent some time together in the period from when they first met to the marriage. The Tribunal is not satisfied however that the evidence establishes that they were in a relationship since August 1999 as claimed. The Tribunal is not satisfied that at the time of application they were residing together at the address in Woolloomooloo as claimed in the application. Evidence was submitted to the Department that the parties made enquiries about a home/land package, and the Tribunal has given this some weight.*

45. *The Tribunal has considered the evidence regarding the reasons for the nominator’s extended stays in Africa, and the reasons why the review applicant was not able to join him there. The Tribunal finds however that the evidence establishes there was only limited contact between the 2 parties during the nominator’s extended absences in Africa, and that this evidence is not consistent with persons who are committed to the relationship.*

46. *The review applicant's representative, in submissions to the Tribunal in response to the Tribunal's letter dated 25 May 2004, stated that the nominator had never disclosed his HIV positive status to the review applicant 'before or during their times together'. Other information before the Tribunal indicates that the nominator was diagnosed with HIV in 1999, and that the review applicant only discovered this fact when advised by the police in relation to charges brought against the nominator. The Tribunal raised this issue in its letter to the review applicant dated 27 June 2005.*
47. *The Tribunal has considered the review applicant's comments on the information. The Tribunal accepts that the review applicant was not aware until well after the marriage that the nominator had been diagnosed in 1999 with HIV, and that this matter has caused the review applicant considerable distress. The review applicant's own evidence is that the parties did discuss health matters, but that the nominator was not willing to undergo an HIV test. The review applicant stated that the nominator persuaded her that there was nothing wrong with him and that he could use a condom if she wanted him to. She stated further that they agreed to this but that the nominator after some weeks threatened her as he apparently did not wish to continue using a condom. The review applicant did not specify the dates when these situations occurred. The Tribunal concludes from the evidence however that the nominator must have known in the period prior to the marriage that he was HIV positive, and that he intentionally did not divulge this information to the review applicant.*
48. *The Tribunal finds that at the time of application, and indeed throughout the period after the application, the nominator failed to divulge to the review applicant or discuss with her a health issue that had potentially serious consequences for his own health as well as the health of the review applicant. The Tribunal finds that the nominator's failure to advise the review applicant of his HIV status indicates a failure of the nominator to communicate with the review applicant on an extremely important personal circumstance affecting their relationship. The Tribunal is not satisfied on the basis of this evidence that the nominator was committed to a long term relationship with the review applicant.*

49. *The Tribunal is not satisfied that cultural factors or the possibility that a party is leading a 'double life' establishes that a person is still committed to the relationship in the circumstances described above.*
50. *The Tribunal has considered the evidence that the review applicant and the nominator had some contact with each other even after the review applicant [sic: nominator] was remanded in custody in March 2003 on fraud charges. The Tribunal has given this some weight. The Tribunal is not satisfied, however, given the other evidence before it, that the evidence of this contact and the evidence that the parties made enquiries regarding home/land packages establish that at the time of application they saw the relationship as a long term one or derived any degree of emotional support from each other.*
51. *The Tribunal is not satisfied that the review applicant and the nominator combined their affairs to any degree, and there is no evidence to support a finding that the parties have made wills or hold superannuation or other policies naming the other party as a beneficiary.*
52. *For the purposes of subregulation 1.15A(5) the Tribunal is not satisfied that the review applicant and the nominator resided together at the same address for 6 months or longer at the time of application.*
53. *The Tribunal has considered all of the evidence regarding the aspects of the relationship including the evidence of the history of the relationship since the time of application. For the reasons above, the Tribunal is not satisfied that at the time of application the review applicant and the nominator were in a genuine and continuing relationship. The Tribunal is not satisfied that at the time of application they were mutually committed to a shared life together as husband and wife to the exclusion of all others.*
54. *The Tribunal accordingly finds that the review applicant and the nominator are not in a married relationship as described in subregulation 1.15A(1A). The Tribunal finds that the review applicant is not the spouse of the nominator at the time of application in accordance with regulation 1.15A. The Tribunal finds that the review applicant does not meet subclause 820.211(2).*

The grounds of review

31. The applicant's counsel relied upon an amended application filed at the hearing. It contained one ground with particulars:

1. *The MRT failed to attain, or failed to exercise jurisdiction by reason that the MRT failed to accord procedural fairness by taking irrelevant considerations into account.*

Particulars

Spouse Visa Application lodged 27 July 2000 (MRT Decision, para [12])

The MRT held at para [53]:

"The Tribunal is not satisfied that at the time of application they were mutually committed to a shared life together as husband and wife to the exclusion of all others".

And at para [55.9]:

"The Tribunal therefore finds that the review applicant does not satisfy clause 820.211, an essential criterion for grant of a Subclass 820 visa".

In making the decision took into account matters after 27 July 2000, including:

At para [18], Nominator went to Africa in October 2000;

At para [20] Nominator lived in Woolloomooloo from April 2000; the applicant then lived in Hurstville;

At para [34] they purchased a car several months after the marriage (which marriage was in July 2000);

At para [34], receipts were produced for purchases after August 2001.

32. In my opinion, the reference to procedural fairness in this ground is misconceived and has no substance. The applicant and her solicitor had invited the Tribunal to refer to the later evidence, seeking to draw advantageous inferences from the use of hindsight. Moreover, it is clear that the Tribunal drew the applicant's attention, including through s.359A invitations, to the possibility that it might consider later events to reflect adversely upon the nature of the marital relationship from its

inception. I do not consider that any issue of procedural fairness has been raised under this ground.

33. On my understanding of the argument presented by counsel for the applicant, it is the reasoning of the Tribunal, not its procedures, which is now challenged. The ground of review contends that events occurring subsequent to the date of application were legally irrelevant to a decision on whether at that date the requirements of the definition of “spouse” were satisfied. It was argued that by taking any such events into consideration, the Tribunal made a jurisdictional error such as is described in *Craig v South Australia* (1995) 184 CLR 163 at 179.
34. It is apparent from the reasoning extracted above that the Tribunal did take into account evidence about subsequent events, including some aspects of the subsequent history of the relationship, when arriving at its series of findings as to the nature of the relationship at the time of visa application. However, I am not satisfied that it relied upon this information in any legally impermissible way.
35. It is well established that, where an administrative decision-maker is required to address the existence of a state of fact at an earlier date, it is entitled to consider later events. However, a distinction has been drawn as to how later events are able to be considered, particularly where a review tribunal may be addressing the issue years later. This is illustrated in *The Hospital Benefit Fund of Western Australia Inc v Minister for Health, Housing & Community Services* (1992) 39 FCR 225, where the Administrative Appeals Tribunal was reviewing a Minister’s decision on whether to disapprove a rule change for health benefits for IVF treatments which imposed a five year previous membership requirement. The Full Court said at 234:

It is, of course, well established that the Tribunal determines what was the correct or preferable decision having regard to the whole of the evidence placed before it. It is not confined to the evidence which was before the primary decision-maker. The Tribunal is, however, obliged to address the same question as was before the primary decision-maker. (citation omitted)

In the present case, the question before the primary decision-maker (the delegate of the Minister) was whether, at the time it took effect, the change imposed an unreasonable or inequitable condition; not whether, in the light of developments

over the ensuing three years until the Tribunal hearing, the effect of the rule change was to occasion a state of unreasonableness and inequity to contributors. Of course, in considering the position as at the date of the rule change, the Tribunal is not confined to the historical position. It is entitled to receive evidence as to prospective developments in relation to IVF, as they appear at the date of the rule change. The reason is that, in evaluating the effect of the change as at that date, account may be taken of predictable developments. But the evidence must be related back to the date of the change.

36. Similar points were made in *Comptroller-General of Customs v ACI Pet Operations Pty Ltd* (1994) 49 FCR 56 at 78-79, and *Comptroller-General of Customs v Akai Pty Ltd* (1994) 50 FCR 511 at 521. Further authorities suggest that, not only is a tribunal able to take into account and use hindsight to assist findings as to an earlier state of affairs involving an element of prediction or evaluation, but that it would err in law if it refused to take relevant later evidence into account. In *Secretary, Department of Family and Community Services v Verney* (2000) 60 ALD 737 at [53], Cooper J said:

[53] Where previous evidence is in the nature of assessments or predications and evidence later becomes available which falsifies the factors on which the assessment was based or demonstrates that the predictions did not prove to be correct, the later evidence is admissible and relevant to the judicial process. To allow the assessments or predications to stand in the face of the falsifying material would not be credible to the judicial process: Mulholland v Mitchell [1971] AC 666 at 680; Henjo Investments Pty Ltd v Collins Marrickville Pty Ltd (No 2) (1989) 40 FCR 76 at 88; 89 ALR 539. So too with administrative review. Later evidence may be relied upon by the tribunal to demonstrate the falsity of any assessment or prediction and the tribunal would not be entitled to ignore material of which it had notice which demonstrated that earlier material was incorrect, incomplete or misleading: Minister for Aboriginal Affairs v Peko Wallsend Ltd at CLR 44-5. [see also Tracy v Repatriation Commission (2000) 101 FCR 149 at [3]]

37. In the present case, some of the judgments required to be made by the Tribunal at the time of application clearly involved evaluative and predictive assessments which were able to be informed by evidence of subsequent events. What was important, however, was that the

Tribunal should only address evidence of later events to consider whether they confirmed the existence or otherwise at 27 July 2000 of a marriage in which the parties had “*mutual commitment to a shared life as husband and wife*” and a relationship which at that time was “*genuine and continuing*”. The Tribunal would have erred if, when addressing item 820.211(2)(a) in the light of subsequent events, it addressed the wrong question, such as whether subsequent events showed that the marriage over its whole period or at a later date lacked the elements required by reg.1.15A.

38. Examining the Tribunal’s reasoning by reference to these principles, I have not been satisfied that it misunderstood how it could reason by reference to later evidence and events. The Tribunal expressly disclaimed attempting to make findings on the state of the marriage at later dates, in particular in a passage at the end of its reasons in [55]-[56], where it explained that its opinion on the “*time of application criteria for the visa in clause 820.211*” meant that it did not need to make “*any findings in regard to the claim of domestic violence*”.
39. Its earlier references to later events appear expressly to focus on how they illuminated the state of the marriage at time of application. This is shown particularly by the repeated references to that date in the concluding findings, which I have extracted above. Thus, at [34] the Tribunal considered the 2001 documents presented by the applicant, but was not satisfied by them that “*at the time of application the parties were involved in joint purchases of major household items*”.
40. In relation to the existence of a shared household, the Tribunal principally addressed the equivocal evidence as to the Woolloomooloo accommodation. It also did consider “*the parties’ subsequent living arrangements*” in [37] and [38], including the implications of the husband’s African travels. However, this discussion focused on the inconclusive nature of that evidence, and at [39] it expressed its ultimate finding in terms reflecting an appreciation of the relevant point of time to be addressed. In my opinion, the Tribunal’s entire discussion of this matter shows a correct and proper approach to the evidence. In view of its uncertainty about whether the applicant could be regarded as sharing a household at the time of application, the

Tribunal was bound to consider whether later events would provide hindsight which resolved these doubts. Its discussion shows that it did not find this illuminating, not that it erroneously addressed only whether the couple shared a household at later periods.

41. In his oral submissions, counsel for the applicant retreated from the proposition that all reference to later events was irrelevant to a decision on item 820.211(2)(a), but argued that later events could only be referred to confirm the existence of the requisite marital relationship at the time of application. I do not consider that the above authorities so confine the use of evidence of later events. Moreover, I do not read the Tribunal's reasoning as using later events to cause it to make negative findings as to the relationship at the date of visa application. Rather, as I have explained above, it referred to them to consider whether, as the applicant had claimed, they confirmed the earlier existence of the required indicia, and it was unable to find that confirmation.
42. Counsel for the applicant argued that the Tribunal's emphasis on the husband's behaviour in relation to his HIV status revealed error of law. It is true that the evidence concerning this only emerged in 2004, long after the time of visa application. However, that evidence revealed the true state of affairs at the time of application, and was plainly admissible and relevant to the Tribunal's consideration. The Tribunal's finding in relation to this clearly shows a correct focusing on the time of application. It found that he "*must have known in the period prior to the marriage that he was HIV positive, and that he intentionally did not divulge this information*" to the applicant. It then expressly found "*that at the time of application ... the nominator failed to divulge to the review applicant or discuss with her a health issue that had potentially serious consequences ...*". It then treated this matter as reflecting on his commitment to a long term relationship with the applicant. In my opinion, this finding was clearly directed at the time of visa application, notwithstanding that it took into account the subsequent period when the husband maintained this conduct.
43. The Tribunal drew together all its previous findings in a conclusion expressed at [53] that the requirements of reg.1.15A(1A)(b)(i) and (ii) were not satisfied "*at the time of application*". Read in the context of its previous findings, and of the factual background to the case, I do not

consider that the Tribunal's opening statement in that paragraph, where it indicated that these conclusions had taken into account "*all of the evidence regarding the aspects of the relationship including the evidence of the history of the relationship since the time of application*", reveals any misconception of law.

44. I therefore am not satisfied that the ground of review raised by the amended application is made out.
45. The applicant's counsel in his written and oral submissions made unfocused complaints about the Tribunal's decision which were clearly outside the ambit of his amended application. These were, in my opinion, almost entirely attacks on the merits of the factual assessments reached by the Tribunal. However, the Tribunal was required to address impressionistic criteria which were particularly difficult to apply to the present case. In this situation a court of judicial review must bear in mind its duty "*to leave the decision of that fact to the public body to whom Parliament has entrusted the decision-making power save in a case where it is obvious that the public body, consciously or unconsciously, are acting perversely*" (*Puhlhofer v Hillingdon London Borough Council* [1986] AC 484 at 518, quoted in *Minister for Immigration & Multicultural Affairs v Eschetu* (1999) 197 CLR 611 at [41]). Counsel's arguments did not cause me to arrive at such a judgment in this case.
46. Other arguments of counsel for the applicant cited authorities having no apparent relationship to the grounds of his application, including *Minister of State for Immigration, Local Government and Ethnic Affairs v Dhillon* (Federal Court of Australia, Full Court, unreported 8 May 1990), *Tolibao-Cortes v Minister for Immigration & Multicultural Affairs* [2001] FCA 1183, *Minister for Immigration & Multicultural Affairs v Asif* (2000) 60 ALD 145, and *Tran v Minister for Immigration & Multicultural & Indigenous Affairs* (2003) 126 FCR 199. Counsel did not seek to add further grounds to the application, and both counsel for the Minister and I found it difficult to identify the argued relevance of these authorities to the present decision of the Tribunal.

47. After considering all the submissions of the applicant's counsel, I am not persuaded that the decision of the Tribunal is affected by jurisdictional error. I must therefore dismiss the application.

I certify that the preceding forty-six (46) paragraphs are a true copy of the reasons for judgment of Smith FM

Associate: Lilian Khaw

Date: 20 April 2007